APPEAL NO. 031650
FILED AUGUST 13, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 19, 2003. The hearing officer determined that because the agreement for a required medical examination (RME) on June 4 and June 18, 2002, do not meet the requirements of Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.5 (Rule 126.5) such as to have the force of a Texas Workers' Compensation Commission (Commission) order to attend an RME, the appellant (self-insured) may not suspend temporary income benefits (TIBs) under Rule 126.6 for the respondent's (claimant) failure to attend the RMEs; that the claimant had good cause within the meaning of Rule 126.6 for his failure to attend the RMEs; that the claimant had disability from June 4 through September 27, 2002, and is entitled to TIBs for that period. The self-insured appeals these determinations. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

EVIDENTIARY OBJECTION

The self-insured asserts that the hearing officer erred in admitting Claimant's Exhibit Nos. 5 and 6 because they were not timely exchanged and because the claimant did not establish good cause for his failure to do so. To obtain a reversal for the admission of evidence, the carrier must demonstrate that the evidence was actually erroneously admitted and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In the present case, the hearing officer commented that the evidence was cumulative of the claimant's testimony. Under the facts of this case, the hearing officer's admission of the two exhibits does not constitute reversible error.

RME AGREEMENT

The hearing officer did not err in determining that the self-insured may not suspend TIBs because the agreements for the RMEs on June 4 and June 18, 2002, do not meet the requirements of Rule 126.5 such as to have the force of a Commission order to attend an RME. In making this determination, the hearing officer explained that the self-insured did not comply with the requirements of Rule 126.5(d). Although the hearing officer referenced Rule 125.5 several times in his decision and order, we note

that this is an obvious typographical error, as Rule 125.5 does not exist. For this reason, the hearing officer decision is reformed to reflect that all references to Rule 125.5 are replaced with Rule 126.5.

Rule 126.6(a) provides:

> When a request is made by the insurance carrier (carrier), or the commission, for a medical examination, the commission shall determine if an examination should be ordered. The commission shall issue an order granting or denying the request within seven days of the date the request is received by the commission. A copy of the order shall be sent to the employee, the employee's representative (if any), and the carrier. The order shall explain the potential loss of benefits and penalty exposure for failing to attend the examination as well as the need to reschedule a missed examination. An agreement between the parties for an examination under [Section] 126.5 of this title (relating to Entitlement and Procedure for Requesting Required Medical Examinations) that the carrier has a right to, has the same effect as the commission's formal order.

Rule 126.5(d) provides:

> Except for an examination under subsection (b)(2) of this section, the commission shall not require an employee to submit to a medical examination at the carrier's request until the carrier has made an attempt to obtain the agreement of the employee for the examination as required by subsection (g). The carrier shall notify the commission in the form and manner prescribed by the commission of any agreement or non-agreement by the employee regarding the requested examination. An examination of an employee by a doctor selected by the carrier shall be requested as follows:
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> (1) Prior to requesting an RME from the commission, the carrier shall send a copy of the request [TWCC-22] to the employee and the employee's representative (if any) in the manner prescribed by subsection (g) of this section in an attempt to obtain the employee's agreement to the examination.
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> (2) The carrier shall give the employee ten days to agree to the examination. The ten-day period begins from the date the carrier sends the request to the employee and the employee's representative (if any). Though the employee has ten days to respond to the request, the carrier is not prohibited from contacting the employee by telephone to discuss the request with the employee and obtain the employee's response.

(3) The carrier shall send the request to the commission after either obtaining the employee's answer to the request or when the employee fails to respond after the ten-day period.

The self-insured argues that it was not required to comply with the provisions of Rule 125.6(d)(1)-(3)[1] because "a carrier need only comply with its provisions if it is requesting a RME *from the Commission*." We disagree. The provisons of Rule 125.6 and 126.6 clearly state that an agreement for an RME is to be made in compliance with the provisions of Rule 126.5.

Specifically, the hearing officer found that the self-insured failed to comply with the requirements of Rule 126.5(d) by failing to send a copy of the TWCC-22 to the claimant prior to attempting to obtain his agreement via telephone. The evidence reflects that the self-insured contacted the claimant on May 20, 2002, requesting that he submit to an RME examination, but the claimant did not receive a copy of a notice of RME appointment (not the same as a TWCC-22) until May 21, 2002. Given the explicit language of Rule 126.5(d) and the fact that the preamble to the rule instructs that the purpose for requiring the TWCC-22 to be sent to the claimant prior to obtaining his agreement is to "help ensure that the employee knows what is being requested," we cannot agree with the self-insured's assertion that the hearing officer erred in determining that the claimant had good cause for failing to attend the RME appointments because the self-insured "did not send [c]laimant the TWCC-22 [RME] Notice or Request for Order before it obtained [the claimant's] agreement to attend these examinations."

The self-insured additionally asserts that the hearing officer erred in finding that the claimant did not receive a copy of the TWCC-22. We note that the hearing officer did not make an explicit finding to that effect. Rather, the hearing officer found that the claimant received the self-insured's "written notice of the RME appointment" on May 21, 2002. As previously explained, the documentary evidence reflects that the notice sent to the claimant was not in the form of a TWCC-22. Rule 126.5(g) provides that a carrier "shall send a copy of the request for a medical examination order required by subsection (d) of this section to the employee and the employee's representative (if any) by facsimile or electronic transmission if carrier has been provided with a facsimile number or email address for the recipient, otherwise, the carrier shall send the request by verifiable means." Rule 126.5(h) provides that a carrier "shall maintain copies of the request for a medical examination order and shall also maintain verifiable proof of successful transmission of the information." The rule goes on to instruct that "verifiable proof includes, but is not limited to, a facsimile confirmation sheet, certified mail return receipt, delivery confirmation from the postal or delivery service, or a copy of the electronic transmission." To the extent that the hearing officer's decision can be read to impliedly find that the claimant did not receive a copy of the TWCC-22, we perceive no

[1] The self-insured mistakenly refers to this rule in its appeal as 126.6(d)(1)-(3). However, Rule 126.6(d) does not contain subsections 1-3 and it is obvious given the context of the argument that the self-insured intended to refer to Rule 125.6(d)(1)-(3).

error because there is no indication in this case that the requirements of Rule 126.5(g) and (h) were satisfied.

DISABILITY

The hearing officer did not err in determining that the claimant had disability from June 4, 2002, through September 27, 2002. Whether the claimant had disability presented a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We conclude that the hearing officer's disability determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order as reformed.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

U.S. CORPORATE SERVICES
800 BRAZOS STREET
AUSTIN, TEXAS 78701.

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Chris Cowan
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Thomas A. Knapp
Appeals Judge